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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LELAND LEWIS HOGAN, Appellant.	)	2 CA-CR 2008-0206 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072667

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
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E S P I N O S A, Presiding Judge.

¶1 Following a jury trial, appellant Leland Hogan was convicted of unlawful use of means of transportation, a class five felony. The trial court suspended the imposition of sentence, placed Hogan on two years' probation, and ordered him to serve a fifteen-day jail term as a condition of probation. On appeal, he contends the trial court erred in denying his motion for judgment of acquittal and in responding to a question from the jury. We affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict. *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). In early May 2007, Hogan began living in a guest room of M.'s house. M. would occasionally allow Hogan to drive one of M.'s vehicles to run errands, on the condition that he use it only for the designated purpose. On Tuesday, May 29, 2007, Hogan asked to use a car the following day, for a day labor job. M. agreed to lend Hogan his minivan with the understanding Hogan would return it at the end of the day. Hogan took the van the next morning but did not return it that evening. The following day, when Hogan still had not returned with the van, M. called the police and reported it stolen.

¶3 A few days later, when M. returned home, he found Hogan there, locked in the guest room, and M. called the police. Hogan told the officer who responded that he had left the van at Picture Rocks and Mile Wide roads and gave the officer the keys. The officer returned the keys to M. and told him where Hogan had said he left the van. M. went to the

purported intersection but found the two roads were parallel to one another and, after several hours of searching the area, was unable to find the van. A few days later, police located and recovered the van.

Discussion

Sufficiency of the Evidence

¶4 Hogan argues that based on the available evidence, "no reasonable juror could have found [him] guilty beyond a reasonable doubt," and that the trial court erred in denying his motion for acquittal, pursuant to Rule 20, Ariz. R. Crim. P. As Hogan acknowledges, we review the trial court's ruling on Hogan's motion for an abuse of discretion. *See State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *Id*. Substantial evidence is proof that reasonable persons could find adequate and sufficient to support a finding of the defendant's guilt beyond a reasonable doubt. *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). If reasonable people could differ as to whether the evidence establishes a fact at issue in the case, then the evidence is substantial. *McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d at 937.

¶5 To convict Hogan of unlawful use of means of transportation, the state was required to prove he knowingly took control, without authority, of another person's means of transportation. *See* § 13-1803(A)(1); *State v. Kamai*, 184 Ariz. 620, 622, 911 P.2d 626, 628 (App. 1995). Hogan argues there was insufficient evidence he had controlled the van,

asserting, "the State did not show that appellant used [M.]'s van as a means of transportation beyond the time he was authorized to do so, as required by *State v. Hoag*, [165 Ariz. 215, 797 P.2d 1233 (App. 1990)]."

¶6 In *Hoag*, a security guard had witnessed the defendant enter a van and attempt to remove a citizens band radio from the dashboard. 165 Ariz. at 215, 797 P.2d at 1233. This court found that a person who "merely enters another's vehicle" without authorization, but without the intent of driving the vehicle, "may be guilty of some crime, depending upon his conduct inside the vehicle, but he is not in violation of § 13-1803." *Id*. at 219, 797 P.2d at 1237. We held that mere "unauthorized entry" does not constitute "control" in the context of § 13-1803. *Id*. at 218-19, 797 P.2d at 1236-37.

¶7 Hogan contends that, as in *Hoag*, the state failed to prove he used the vehicle as a means of transportation. But Hogan reads *Hoag* too broadly. In *Hoag*, the defendant briefly entered the vehicle to steal something out of it and did not keep the owner from using it, whereas here, Hogan retained possession of the vehicle without permission. Thus, the question in *Hoag*, unlike here, was whether mere "unauthorized entry" or trespassing into a vehicle constituted control for purposes of § 13-1803. That is not the issue in the present case. But our decision in *State v. Griest*, 196 Ariz. 213, 994 P.2d 1028 (App. 2000), is on point. There, the victim testified he had given the defendant his keys and authorized him to use his van for the sole purpose of jump-starting another car; the defendant, however, started the car and drove away. *Id*. ¶ 2. Affirming the conviction, Division One of this court

concluded that unauthorized control of a vehicle "includes a situation where the defendant first gained temporary control by permission of the owner and then 'took unauthorized control' by exceeding that authority." *Id*. ¶ 5.

¶8 Hogan argues, however, that *Griest* is consistent with his interpretation of *Hoag*—that to control a vehicle, one must drive or intend to drive it. Hogan asserts that the defendant's use of the van had been unauthorized in *Griest* because the defendant had driven it, thereby satisfying the element of control for purposes of the statute. But in *Griest*, we did not condition control on driving, reasoning, "once the Defendant put the van to a use the owner did not intend, and for a period of time that exceeded the owner's permission, he was doing so *without lawful authority* and was *knowingly taking unauthorized control over* it." 196 Ariz. 213, ¶ 5, 994 P.2d at 1029. Just as in *Griest*, once Hogan kept the van past the time he was authorized to use it by failing to return it, he did so without lawful authority and knowingly took unauthorized control over it.

¶9 Moreover, "control" is defined in the Arizona criminal statutes as acting "so as to exclude others from using their property except on the defendant's own terms." A.R.S. § 13-1801(A)(2). It is undisputed that Hogan took M.'s van and failed to return it as promised. M. was unable to use his van in any capacity until it was recovered and returned to him. Hogan kept the keys to the van days after he was to return it and gave police incorrect information regarding the van's whereabouts, thereby preventing M. from retrieving it. Accordingly, he acted "so as to exclude [M.] from using [his] property except

on [Hogan]'s own terms." § 13-1801(A)(2). There was substantial evidence from which the jury could reasonably find that Hogan had unauthorized control of M.'s van in violation of § 13-1803. Accordingly, the trial court correctly denied Hogan's Rule 20 motion.

¶10 Hogan also asserts that his Fourteenth Amendment right to due process was violated, arguing "the trial court appeared to base its denial of the Rule 20 motion at least in part on the fact that Appellant had not proven his innocence." At trial, in response to Hogan's Rule 20 motion, the state argued that the evidence the van was not returned on time and no attempt was made to contact the victim or explain why it was not returned, would allow the jury to "reasonably infer that the defendant had unauthorized control of this van." In denying Hogan's motion, the trial court noted he was to return the van the evening of the day he had been permitted to use it, but failed to do so, adding "[t]here's no evidence to indicate any attempt to explain why it was not." Hogan argues the trial court esentially required him to prove his innocence and based its ruling not on the state's evidence alone, but rather "on what Appellant had *not* proven." We disagree.

¶11 Hogan's failure to provide any explanation to M. for not returning the van was relevant circumstantial evidence on the issue of whether Hogan had controlled the vehicle without authorization. *See* A.R.S. § 13-2305(1) ("Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft."); *State v. Mohr*, 150 Ariz. 564, 568, 724 P.2d 1233, 1237 (App.

1986) (acknowledging the permissibility of an inference of guilt based on possession without a reasonable explanation); *see also Barnes v. United States*, 412 U.S. 837, 843-46 (1973) (long-standing notion "that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods," has consistently been held to satisfy the requirements of due process). This inference has been explicitly applied to theft, *see* A.R.S. § 13-1802(C), and unlawful use of means of transportation is a lesser-included offense of theft, *see, e.g.*, *Kamai*, 184 Ariz. at 622, 911 P.2d at 628. The trial court did not err in considering Hogan's failure to provide any explanation for not returning the vehicle on time as a factor on the issue of control.

Jury Question

¶12 Hogan next contends the court erred in responding to a question the jury submitted during deliberation. A trial court should fully and fairly respond to all jury questions, and attempt to appropriately assist the jury without prejudicing the rights of the parties. *State v. Fernandez*, 216 Ariz. 545, ¶ 15, 169 P.3d 641, 647 (App. 2007), *cert. denied*, ___ U.S. ___, 129 S. Ct. 460 (2008). However, courts are "given broad discretion in determining whether and how to respond to jury questions." *State v. Cheramie*, 217 Ariz. 212, ¶ 21, 171 P.3d 1253, 1260 (App. 2007), *rev'd in part on other grounds*, 218 Ariz. 447, 189 P.3d 374 (2008).

¶13 Before commencing its deliberations, the jury was instructed:

> The crime of unlawful use of means of transportation requires proof of the following two things:

1. The defendant knowingly took unauthorized control over another's means of transportation; and

2. The defendant did so without intending to deprive the owner of it permanently.

The jury was also instructed that "unauthorized control requires a showing that one intends to operate or use the means of transportation as a means of transportation." During deliberation, the jury asked "[i]f the defendant had unauthorized control of the vehicle but did not drive the vehicle (or intend to) will this still be in line with the [definition of the crime charged]?" After consulting with counsel for both Hogan and the state and over Hogan's objection, the trial judge responded to the jury's question by saying "'[o]perate or use' is not necessarily limited to driving a means of transportation."

¶14 Hogan asserts this response was in direct conflict with *Hoag*. But, as discussed above, *Hoag* does not define "control," but rather, stands for the proposition that mere unauthorized entry, or trespassing, in a vehicle does not constitute "control," for the purposes of § 13-1803. 165 Ariz. at 219, 797 P.2d at 1237. And *Hoag* does not hold or suggest that a defendant must drive a vehicle in order to be convicted of unlawful use of means of transportation. On the contrary, the court in *Hoag* acknowledged:

> [t]here is no doubt that the scope of conduct prohibited under former § 13-672(C) was broadened by the enactment of § 13-1803; under former § 13-672(C), a defendant had to "take" the vehicle, whereas under § 13-1803, a defendant need only "take unauthorized control over" it—thus suggesting that "asportation" or movement of the vehicle is no longer required.

Hoag, 165 Ariz. at 217, 797 P.2d at 1235. This is consistent with the trial court's statement that "'[o]perate or use' is not necessarily limited to driving a means of transportation," because movement of the vehicle is not required. The court's response correctly stated the law.

Conclusion

¶15 For the foregoing reasons, Hogan's conviction and sentence is affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

JOHN PELANDER, Judge